George Joseph Orchard Siding, Inc. *and* International Brotherhood of Teamsters, AFL–CIO. Case 19–CA–25003

April 30, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On June 18, 1998, Administrative Law Judge Clifford H. Anderson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

We adopt the judge's finding, for the reasons stated by him, that the evaluation system implemented by the Respondent's Plant Manager Berndt, which disqualified 15 employees from further employment because they received a score of 7 or below, was motivated by Berndt's desire to rid the Respondent of the Union's main supporters. We also adopt the judge's recommended remedy, which ordered reinstatement with backpay for the 15 employees[3] who were on layoff and were not recalled to work, because their evaluation scores were below that cut-off point.

Our dissenting colleague contends that a remedy for all 15 is unwarranted because, in his view, the evaluation system itself was not unlawful but was merely administered in an unlawful manner so as to weed out union activists. He thus concludes that the 3 employees out of the 15 who were not shown to be union supporters must have been unaffected by the Respondent's discriminatory scheme. We disagree. The judge accepted that the original decision to evaluate employees before making recall decisions was not necessarily discriminatory, but he concluded that the system was used "as a pretext" to avoid recalling union activists. In this connection, the judge found that the Respondent used a point-scored evaluation system, but did not decide on the cut-off point until after it had rated employees. Clearly, at that point, it could see who would be eliminated under any given cut-off point. The judge's "pretext" finding is implicitly based on a conclusion that the cut-off point was chosen for discriminatory reasons, and we agree with that conclusion. Thus, employees who were not recalled because they failed to make that cut-off were victims of the Respondent's discrimination whether or not they were union activists.

Once that finding of discrimination is established, the appropriate remedy is clear. In cases involving the implementation of a disciplinary or other type of personnel system that has been found unlawfully motivated by employees' union activities, status quo ante relief is customarily imposed by the Board and courts on behalf of all adversely affected employees, regardless of specific evidence that each employee adversely affected had been engaged in such activities. *Hyatt Corp. v. NLRB*, 939 F.2d 361, 375 (6th Cir. 1991), enfg. *Hyatt Regency Memphis*, 296 NLRB 259, 263, 266 (1989) ("where a system as a whole was implemented for a retaliatory purpose, the Board need not find illegal motivations as to specific individuals"). See also *Robinson Furniture, Inc.,* 286 NLRB 1076, 1076–1078 (1987); *Joe's Plastics, Inc.*, 287 NLRB 210, 211 (1987); *International Business Systems, Inc.,* 247 NLRB 678, 681–682 (1980), enfd. mem. 659 F.2d 1068 (3d Cir. 1981). This approach not only fully remedies the violation, but also avoids effectively discriminating against injured employees on the ground that they failed to participate in union activities.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, George Joseph Orchard Siding, Inc., Yakima, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified below.

1. Substitute the following for paragraphs 1(b) and (c) of the recommended Order.

"(b) Adversely evaluating employees and failing to recall the following employees in an effort to get rid of the most active employee supporters of the Union:

Maria Amaya	Martha Bello
Alma Ceballos	Ofelia Corona
Victor Delgadillo	Lucila Dominguez
Xochil Guttierez	Rocio Larios
Loaurdes Nagana	Iracema Maldonado
Reyna Morales	Lucille Paradise
Erika Peneloza	Francisca Peraza

Bertha Valle"

(c) In any like or related manner interfering with, restraining, or coercing employees and or employee appli-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Inasmuch as the judge has found that the Respondent unlawfully failed to recall certain employees who were already on layoff status, we delete any reference to "layoff" from his remedy and Conclusion of Law 4. We shall also amend the judge's recommended Order and notice to conform to the violations found, and we shall also amend the notice to conform to the narrow cease-and-desist language in par. 1(c) of the recommended Order.

[3] Twelve of the fifteen were identified on the record as being active supporters of the Union.

cants in the exercise of the rights guaranteed them in Section 7 of the Act."

2. Substitute the following for paragraph 2(a) of the recommended Order.

"(a) Rescind the adverse evaluations and failures to recall the employees named above."

3. Substitute the attached notice for that of the administrative law judge.

MEMBER HURTGEN, dissenting in part.

I agree that the evidence establishes that Respondent sought to manipulate the evaluation process so as to make it less likely that the principal union activists would be reinstated. In this regard, I note that Plant Manager Berndt told two supervisors that the evaluation system could be used to get rid of the principal union activists.

The judge and my colleagues jump from the foregoing evidence to the conclusion that all 15 nonrecalled employees are discriminatees. I would not make that leap. Those 15 nonrecalled employees include 3 who were not union activists at all. Similarly, there were 21 known union activists. Nine were recalled, and twelve were not.

Based on the above, I cannot conclude that the plan, as effectuated, was aimed at weeding out all union activists or at assuring that nonactivists would be reinstated. In this latter regard, it would appear that the three nonrecalled nonactivists were rejected on the merits.

Thus, I would not seek reinstatement of these three employees. Indeed, I have some misgivings about the 12 nonrecalled employees who were union activists. In this regard, as noted supra, there were nine union activists who *were* recalled. However, in light of the aforementioned evidence as to the Berndt statement, I am willing to find a violation as to the 12 nonrecalled union activists.

In sum, I dissent as to the three nonrecalled nonactivists.[1]

Contrary to the assertion of my colleagues, I do not agree that the evaluation system was itself unlawful. If it were, I might agree with my colleagues that all who were adversely affected by that system would be entitled to a remedy, irrespective of whether they were union activists.[2] However, the evidence in this case shows only that Respondent *administered* the evaluation system in such a way as to weed out union activists.

There is no showing that the system was administered so as to weed out nonactivists. Indeed, that would have been contrary to Respondent's strategy. Accordingly, the remedy should extend only to the employees who were discriminated against because of their union activities. My colleagues assert that Respondent compiled the evaluation scores and then discriminatorily drew a line so that most union activists would fall below that line. Thus, in their view, all employees who fell below that line were discriminatees, whether they were union activists or not. The problem with this theoretical position is that the judge's findings do not clearly support it. To the contrary, the judge found that Respondent discriminated by giving "adverse evaluations." That is, Respondent gave lower scores to union activists in an effort to weed out many of them.

I do not suggest that the theory of my colleagues is wholly without support. I merely assert that there is at least ambiguity as to the precise type of discrimination involved herein. In order to obtain the remedy granted by my colleagues, the General Counsel had the burden to show the type of discrimination postulated by my colleagues. He has not done so.[3]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a trial before an administrative law judge at which we appeared and presented evidence and argument, the National Labor Relations Board has determined that we have violated the National Labor Relations Act and has ordered us to post this Notice and to abide by its terms.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

We give you the following assurances:

WE WILL NOT engage in surveillance of employees' attendance at union meetings.

WE WILL NOT adversely evaluate and fail to recall employees in an effort to get rid of the most active supporters of the International Brotherhood of Teamsters, AFL–CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees and or employee applicants in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL rescind our wrongful adverse evaluations of and failures to recall the following employees:

Maria Amaya Martha Bello

[1] This is not a case where an employer discriminatorily closes down an entire department because it is prounion. In that case, all victims of the shutdown, even nonactivists, are discriminatees.

[2] See cases such as *Hyatt Regency*, 296 NLRB 259 (1989), enfd. 939 F.2d 361 (6th Cir. 1991), "where a system as a whole was implemented for a retaliatory purpose."

[3] The General Counsel, on brief, speaks only of a "rigged evaluation process." He does not say how it was "rigged."

Alma Ceballos	Ofelia Corona
Victor Delgadillo	Lucila Dominguez
Xochil Guttierez	Rocio Larios
Loaurdes Nagana	Iracema Maldonado
Reyna Morales	Lucille Paradise
Erika Peneloza	Francisca Peraza

Bertha Valle

WE WILL offer, in writing, immediate and full reinstatement to each of these employees, terminating, if necessary, any replacement employees or, if his or her job no longer exists, to a substantially equivalent position, without prejudice to his or her seniority or any other rights or privileges previously enjoyed, and WE WILL make the employees named above whole, with interest, for any loss of earnings and other benefits suffered as a result of our discrimination against them.

WE WILL remove from our files any reference to our unlawful adverse evaluation of and failure to recall the employees named above and WE WILL notify each named employee in writing that this has been dome and that our unlawful conduct will not be used against him or her in any way.

WE WILL preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records and other records and documents necessary to analyze the amount of backpay and other moneys due under the terms of this Order and to insure that the terms of this Order have been fully complied with.

GEORGE JOSEPH ORCHARD SIDING, INC.

Irene Hartzell Botero and *Martin M. Eskenazi, Esqs*., for the General Counsel.

Ryan M. Edgley, Esq. (*Halverson & Applegate, P.S.*), of Yakima, Washington, for the Respondent.

Robert H. Gibbs, Esq. (*Gibbs, Houston, Pauw*), of Seattle, Washington, for the Charging Party.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge, I heard this case in trial during the weeks of October 7 and 21, and November 18, 1997, in Yakima, Washington, pursuant to an order consolidating cases, consolidated complaint and notice of hearing issued by the Regional Director for Region 19 of the National Labor Relations Board on March 31, 1997, and amended on September 18, 1997, based on a charge in Case 19–CA–25003 filed on March 3, 1997, by the International Brotherhood of Teamsters, AFL–CIO (the Union) against George Joseph Orchard Siding, Inc. (the Respondent) and amended on January 31 and February 25, 1997. Posthearing briefs were submitted by the General Counsel, the Charging Party, and the Respondent on December 24, 1997.

The complaint, as amended, alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) on August 25, 1996, through Supervisor Juana Magana, by surveiling employees attending a union meeting in a public park or, in the alternative, creating among those employees the impression of surveillance of their union activities. The complaint further alleges at paragraph 7 that the Respondent violated Section 8(a)(3) and (1) of the Act on or about August 27, 1996, and with respect to Paradise on September 25, 1996, by laying off the following 15 employees: [1]

Maria Amaya	Martha Bello
Alma Ceballos	Ofelia Corona
Victor Delgadillo	Lucila Dominguez
Xochil Guttierez	Rocio Larios
Loaurdes Nagana	Iracema Maldonado
Reyna Morales	Lucille Paradise
Erika Peneloza	Francisca Peraza

Bertha Valle

Complaint subparagraph 8(a) as amended alleges that the Respondent laid off these employees because certain of the Respondent's employees, including certain of those laid off, assisted the Union and engaged in concerted activities and, to discourage employees from engaging in these activities. Complaint subparagraph 8(a) as amended alleges, in the alternative, that, if the layoff had a lawful business justification, the employees named above were selected for inclusion in the layoff because certain of the Respondent's employees, including certain of those laid off, assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities.

The Respondent denied that it had committed any violations of the Act. More specifically, the Respondent alleges its shut down and modernization of a production line and, the concomitant selection of production employees for lay off was a business decision free from consideration of employees' union and or protected activity. Similarly, it argues its determination not to recall or rehire certain of those production-line employees was based on the Respondent's evaluation of its business needs and the employees' work skills and was free from prohibited considerations. Addressing the surveillance allegation, the Respondent argues that Juana Magana was coincidentally in the area of the park where employees attended a union meeting, that she did not surveil employees' union activities and her presence was benign and not in violation of the Act.

FINDINGS OF FACT

On the entire record including helpful briefs from the Respondent, the Charging Party, and the General Counsel, I make the following findings of fact[2]

I. JURISDICTION

The Respondent, a corporation with an office and places of business in the Yakima Valley, Washington, is engaged in the business of operating fruit packing, storage, and distribution facilities. During its business operations the Respondent has annually purchased and received directly from points outside the State of Washington, or from suppliers within the State which in turn obtained such goods from outside the State, goods and services valued in excess of $50,000 and in the same

[1] Several of the employees had different spellings of their names in the record: Guttierez was also recorded as Gutierez or Gutierrez; Loaurdes Nagana as Lourdes Magana; Reyna Morales as Reina Morales; and Iracema or Irazema Maldonado as Iracema Mendoza.

[2] As a result of the pleadings and the stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

periods has sold and shipped goods and services valued in excess of $50,000 from its facility to points outside the State of Washington, or to customers within the State, which customers themselves were engaged in interstate commerce by other than indirect means.

Based on the above, there is no dispute and I find the Respondent is and has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Yakima Valley of Washington State is orchard country. Area orchardists cultivate and harvest apples, cherries, and other fruits with apples the primary crop. Some 70 local area-packing houses are consigned, sort, pack, and sell the crops of area growers. Among the dozen largest is the Respondent with packing, storage, and distribution facilities in the Yakima Valley communities of Yakima and Zillah, Washington—communities some 30 miles apart. The Respondent's administrative offices are across the street from its Yakima packing facility.

The Respondent's Yakima production facility (the plant) processes various types of apples by means of three production lines. The "Pre-size line" sorts apples. Apples are packaged into trays on the "Trayfill line"; also referred to as the "red line" because Red Delicious apples are processed on it. The third production line or "Golden line" handles Golden Delicious Apples or Golden apples exclusively. Because of their thin skins and heightened susceptibility to bruising, Golden apples are sorted, sized, and packaged independently of other apple varieties.

Apples are a seasonal fruit. Apples are harvested and processing begins in about September and generally continues through the following May. At that time the Respondent's apple processing is discontinued and cherry processing is taken up for the much shorter cherry harvest season. At times the Golden line resumes apple-processing operations in the summer utilizing earlier stored fruit. This resumption continues, if the fruit is available, until the new Apple harvest commences and new apples arrive for processing in September.

Gary Bailey at all relevant times has been the Respondent's president, general manage,r and one-third owner. Gaylord Enbom is assistant general manager in charge of the Field Departments. Paul Berndt is the manager in charge of the Zillah facility. Since March 1995 Greg Berndt has been plant manager of the Yakima facility. Paul Berndt is Greg Berndt's father. Gary Bailey is Greg Berndt's uncle.

Each of the plant's three lines has a supervisor, an assistant supervisor, line employees, and associated support personnel. The line supervisors and assistant supervisors' supervisory status under Section 2(11) of the Act was not in contest. The line supervisors reported to Plant Manager Greg Berndt. When the apple lines were not in operation, at least some of these individuals also served as supervisors in Yakima and/or in Zillah over aspects of cherry processing. Those engaged in such other assignments did not necessarily report to the plant manager during that employment.

Cindy Rines was the Golden-line supervisor from about the spring of 1995 through May 1996.[3] She was replaced by Veronica Hernandez who continued to serve as Golden-line supervisor at all relevant times thereafter. The assistant supervisor of the Golden line for the 1995–1996 season was Ms. Kim Sifuentes. Linda Villarruel replaced Sifuentes[4] in August 1996 and served as assistant supervisor of the Golden line through November 1996. Veronica Hernandez was the Presize line supervisor from July 1995 till July 1996.[5] She was replaced by Gloria Gutierrez in August 1996. Gutierrez continued in that position until she quit in September 1996 on learning she was being transferred to a yet-to-be determined nonsupervisory position. The assistant Presize line supervisor was Juana Magana, sister in law of Ms. Hernandez, from about August 1995 to September 1996. Johnny Sifuentes was the Trayfill line supervisor at all relevant times.

The Respondent determined to purchase new Golden Delicious apple packing equipment in late 1995 and install the new Golden-line equipment during the 1996 seasonal shutdown of the line. The "old" Golden line was shut down and line employees were laid off in May 1996. The now "new" Golden line was returned to production on August 19, 1996. Not all former Golden-line employees were recalled even though in the following weeks new employees were hired to work on the line. The propriety of the permanent layoff of Golden-line employees and the failure to recall those employees in and after August 1996, are the heart of the instant dispute.

B. Events

1. Employees' union and concerted activities

The Union commenced a general organizing campaign among area apple packing houses in early 1996. Velma Perez was employed by the Union as an organizer of several local packing houses, including the Respondent, by March 1996 and at that time commenced contacting various employees of those employers initially by telephone and thereafter by telephone and by way of union meetings. Perez testified that the Respondent's employees: Delfina Espinoza from Yakima,[6] Lucila Dominguez, Lourdes Magana, Maria Sorventes, Virginia Garcia, and Maria Amaya were initially active and were utilized as organizing committee leaders. They were thereafter joined by employees: Maria Amaya, Lucila Dominguez, Bertha Valle, Maria Amaya, Lucila Dominguez, Xochil Gutierrez, Delfina Espinoza from Yakima, and Delfina Espinoza from Toppenish.

From April 14 through August 25, 1996, union organizational meetings were held with interested employees of the Respondent both at the local area Teamsters' hall and at Elks

[3] Thereafter Rines supervised Zillah cherry packing from June 8 through June 8 or 9, 1996. She then served as a nonsupervisory "pressure tester" and Asian pear sizer until her later transfer to the Trayfill line as a sorter. She ended her employment with the Respondent just before Labor Day 1997.

[4] Ms. Sifuentes married Johnny Sifuentes in January 1994. He was promoted that year to assistant Trayfill line supervisor and thereafter to supervisor. He held that position at least through the time of his testimony in November 1997.

[5] Thereafter she had Yakima cherry packing supervisory duties before her assignment to the Golden line in August 1996.

[6] Two individuals named Delfina Espinoza—one from Yakima and the other from Toppenish, a local area city, were involved in these events. When necessary, each individual has received her appropriate geographical designation.

Park, a public park on Hathaway Street in Yakima. The meetings were publicized by the Union and by activist-employees by telephone, leaflet and by word of mouth on the job, and during lunch and other breaks.

Employees circulated and submitted to the Respondent three petitions. Employees Delfina Espinosa and Berta Valle circulated three copies of a handwritten petition in both English and Spanish dated June 27, 1996, asserting:

> We demand with this petition that you council Veronica Hernandez to treat people better with respect, not call us Wetbacks or swear at us[.] [I]f she can not do this then terminate *her*! [Emphasis in the original.]

The 3 copies of the petition acquired some 80 signatures including those of Alma Ceballos, Victor Delgadillo, Rocio Larios, Lourdes Magana, Irazema Maldonado, and Berta Valle. The originals were submitted to the Respondent presumably some time after circulation commenced. At about this time employee Lucia Domingues circulated a petition designed to retain Cindy Rines as the Golden-line supervisor. This petition was signed by Lourdes Magana, Lucia Dominguez, Berta Valle, Maria Amaya, and Irazema Maldonado.[7] The petition was submitted to the Respondent. Berndt testified that he received this petition along with the Hernandez petition and read them.

A third petition, typewritten in English and Spanish, was circulated in late July and submitted to Gary Berndt by employees including Delfina Espinosa, Beatriz Navarro, Amanda Espinosa, Lucrecia Acosta, Elena Arias, and Carlotta Chacon on August 5, 1996. The petition asserted:

> We the workers of George Joseph demand that our seniority be respected. We are a large group who have worked for you for years. We have not been called to work and need our salaries and benefits to support ourselves. It is an injustice that this company is hiring new people while those of us who have worked here for years are without work.

This petition copies bore 75 signatures including those of employees: Maria Amaya, Alma Ceballos, Ofelia Corona, Victor Delgadillo, Lucia Domingues, Xochil Gutierrez, Lourdes Magana, Irazema Maldonado, Reina Morales, and Berta Valle.

2. The Respondent's knowledge of the employees' union and concerted activities

The Union publicly announced its intention to initiate an organizing drive among packing house employees, the "Teamsters Apple Campaign," and that fact received press coverage in the Yakima Valley and was a subject of conversation in the packing house community. There is no dispute that in early 1996 the Respondent and other area packinghouses were well aware that a union organizing drive directed to their employees was in prospect.

Substantial testimony was received from union-supporting employees that, from the time of the commencement of their union activities in April, they and other employees discussed union activities on the line and, at lunch in the lunchroom within hearing distance of various supervisors. The supervisors generally denied hearing such conversation. The bulk of the employees involved were either primarily or exclusively Spanish speakers and their conversations were conducted in Spanish. The Respondent's management was essentially entirely English speaking; first-line supervision was generally bilingual. Sifuentes does not speak or understand Spanish.

A meeting of employees was held by the Respondent on July 9 to "discuss union efforts to organize industry workers in the valley." In that meeting, and by letter dated July 30, 1996, to all employees, the Respondent described elements of the NLRB representation election process as well as the process of collective bargaining and sought to emphasize its view that the Respondent's terms and conditions of employment compared favorably with area employers and that union representation was neither necessary nor desirable. Gloria Gutierrez, who is bilingual, replaced Veronica Hernandez as Presize-line supervisor in July 1996, a position she left in August. Gutierrez testified that during this July—August 1996 period she was "very close" to Ms. Hernandez and Office Secretary Brenda Flores and would go to lunch with them. During or en-route to lunch on these occasions, the trio would "run into" employees who Hernandez would point out to Gutierrez by name as "union." So, too, Gutierrez testified that Hernandez would come over to the Presize-line where Gutierrez was working as the new supervisor and would point out certain employees to Gutierrez as union supporters and warn her "to be careful of the ones that were in the union." Hernandez denied this testimony. Brenda Flores did not testify.

Gutierrez testified to attending a meeting in July with Greg Berndt, Veronica Hernandez, Johnny and Kim Sifuentes, and Brenda Flores in which the employees' petition respecting Ms. Hernandez was discussed. She recalled that Berndt and Hernandez had the pages of the petition before them and reviewed the names of the employees who signed the petition. Hernandez read the employees' names aloud and identified to Berndt the signers she believed were the most active union supporters. In some cases a discussion would occur between the two respecting who was active for the Union. Berndt, in Gutierrez' recollection, said that "they needed Veronica Hernandez" and "the people that were in the union, we had to get rid of the people in the union because they were causing too much trouble." Gutierrez was unable to name all the employees identified by Berndt and Hernandez in this process as "union," but estimated their number to be approximately 20.

Ms. Villarruel testified that she interpreted for Berndt at a May 1996 meeting with employees in which he announced that the new Golden line would be installed during the cherry season, that the installation might take some time to conclude and that the employees should be patient. In answer to an employee question about possible layoffs resulting from the new installation, Villarruel recalled that Berndt told the employees that there would not likely be layoffs but rather additional hires and that the employees might be able to have their family members come to work.

Villarruel recalled that Berndt approached her in early July about holding a meeting for employees about unions.

> He went up to me, and he asked how things were going. He usually asked that, how things were going and if I had heard anything about the union from the employees, and I said no, and he asked me if I thought it would be a good idea to hold a meeting, and I said that it wouldn't be a bad idea, and he said so the people at George Joseph want a union and he kind of

[7] The Respondent did not retain a copy of this petition nor did the Union. The evidence of employee signatures, while undisputed, came from individual employee witnesses and did not purport to identify all who signed the petition.

like smiled, and he goes okay, thanks, and he walked off, and I went back to the line.

The meeting was held. Villarruel interpreted for Berndt at the meeting and, after the meeting, was present when several agents of the Respondent engaged in a conversation in which they speculated on the union sympathies of several of the attending employees. Mr. Berndt disputed Ms. Villarruel's testimony.

3. Events respecting the Golden line

Greg Berndt came to the Respondent in late 1993 as a 30-something former Air Force pilot with an MBA and family connections to the firm. Following an orientation period and experience as line supervisor in the direction of special projects, he became plant manager in early 1995. Greg Berndt testified that as a new employee with the Respondent he took some time to familiarize himself with the business generally as well as the Respondent's operations as compared and contrasted to other similar operations in the area. He came to view the Respondent's operations as needing improvement and, set in motion a series of changes both in managerial/supervisory practices and in line production operations.

Mr. Berndt testified that he endeavored initially to make supervisory changes and then utilize the new supervision to address production and personnel problems on a step-by-step basis. Thus, he testified he changed supervisors over time, first on the Trayfill line, then in shipping and receiving departments, the Presize line, the Golden line and finally in maintenance and cleanup crew. Berndt worked with the new supervisors to evaluate personnel and testified that terminations occurred over the course of time in other departments.

The Respondent investigated various possibilities to improve production and, in early 1996, settled on acquiring on new machinery for the Golden line to be installed after the end of the 1996 Golden apple packing season with the completion timed to allow resumption of the line in August 1996 with the new crop. Berndt testified that by "the spring of '96, with a number of the other departments fixed" he came to focus on the Golden line and became increasingly aware of quality problems with that line both as to product and personnel. Aware that the production line would be modernized in the summer of 1996, Bernt testified he decided to delay making any personnel changes among Golden-line production employees until the new line machinery was installed. His desire was, in effect, to make all necessary changes at once rather than initiate changes in the operation of the "old" line and later have to reconsider circumstances again when the new equipment was in operation.

The "old" Golden-line shut down in May 1996 and employees were laid off.[8] The Respondent determined to replace Golden-line Supervisor Cindy Rines with Veronica Hernandez and continue Kim Sifuentes as the assistant supervisor. Berndt, Hernandez, and Sifuentes testified that in July, Berndt requested an evaluation of the "old" Golden-line employees to provide a means of separating the good employees who would be recalled when the new line commenced operations from the unsatisfactory workers who would not be recalled. Berndt testified that this evaluation process occupied the three from mid- or late July through early August 1996.

Ms. Sifuentes testified that as instructed she undertook the initial evaluation of Golden-line employees. In doing so, she utilized her own knowledge of employees as well as a few quality control sheets which were located to evaluate employee performance for quality, speed, and accuracy. Ratings of from 1 to 10 were assigned each employee with the higher score indicating better performance. Employee personnel files were not consulted. Following this initial evaluation Hernandez, Berndt, and Sifuentes held several meetings in which employee ratings were discussed and the opinions of Berndt and Hernandez considered. Sifuentes testified that her initial rankings were largely retained after the review process had been concluded.

Hernandez, Berndt, and Sifuentes testified that rankings of the Golden-line employees were based on merit and not on employee union or protected activities. Sifuentes testified that the ratings were made and scores assigned without any predetermined number of employees in mind to lay off or retain. Both Berndt and Sifuentes testified that the "cut off" scores of eight and above—justifying retention and, seven and below causing permanent layoff were decided only after employees had been rated.

Gloria Gutierrez testified that at the meeting in July she attended as Presize supervisor, as described supra, the discussion—which was primarily, if not exclusively, conducted by Berndt and Hernandez—also addressed the then planned Golden-line employee evaluation process. At that time, as she recalled it, it was contemplated that the "new" Golden line would initially need fewer employees to operate although later it might later require additional staffing. The "old" Golden-line employees were to be evaluated on a 1-to-10 basis keyed to work ability with those employees receiving a minimum score being retained and those failing to receive that score being laid off. Gutierrez testified that Berndt said, in effect, that the evaluation system did not have to be followed, but rather could be used as a pretext to get rid of the employees the Respondent had identified as the main union supporters. Greg Berndt, Veronica Hernandez, Johnny Sifuentes, and Kim Sifuentes denied these attributions.

The Golden-line modernization was concluded by August 1996. The laid-off Golden-line employees who met the scoring criterion, i.e., a rating of 8 or better, were recalled and the new Golden line started up on August 19, 1996. The other Golden-line employees, i.e., those with a score of 7 or lower, were not contacted or recalled. Some of these "not recalled" former Golden-line employees appeared at the facility to commence work in the initial days of the line's operation and were told by management they were not going to be recalled. Thereafter, by letter to the low scoring employees, the Respondent informed them that they would not be recalled based on their score in the evaluation process.

The "new" Golden line initially operated with just the returning employees, but within the week, and with greater frequency thereafter, new employees were hired. The low scoring former Golden-line employees were never recalled and, those who appeared at the facility seeking to return to work, were turned away. There is no dispute that the 15 individuals alleged by the General Counsel as improperly laid off in the complaint, as named supra, were not recalled.

[8] Some employees, as in times past, transferred to the cherry packing underway in both Yakima and Zillah following the end of the Apple season.

4.The August 25, 1996 union meeting in the park

The Respondent's failure to recall many employees engendered questions among the union-supporting employees. The Union announced, publicized by the distribution of leaflets at work and held an employee union meeting at Elks Park on August 25, 1996. Several employee witnesses testified that as the attendees were in the open area of the park, they observed admitted Supervisor Juana Magana drive by in her brown Ford Bronco automobile several times. While the testimony was not consistent, the versions generally described Magana with a male passenger—likely her husband—driving slowly by and observing the gathering from the vehicle.

Ms. Magana testified that at relevant times her mother-in-law lived near Elks Park and that she had occasion to visit her relative quite frequently. She testified further that when visiting her mother-in-law she would often come and go on errands or would assist in teaching her daughter to drive an automobile. She testified that she often drove by the park in such circumstances and may well have done so on August 25. She denied, however, observing the assembled employees or surveilling employees' union activities.

Ms. Gutierrez testified that Veronica Hernandez told her before the Golden-line layoffs that the Respondent learned that employees were having union meetings in a Yakima park and "they sent somebody—they were having union meetings at a park, and someone took the names that were there, and they brought that piece of paper back and that's how they knew who was in it." Hernandez denied Gutierrez' allegations.

C. Analysis and conclusions

1. Complaint paragraph 7—the Golden-line employee layoffs

The Board in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), established a test for approaching discrimination allegations which was recently restated in *Manno Electric,* 321 NLRB 278, 280 fn.12 (1996):

> Under [*the Wright Line*] test, the Board has always first required the General Counsel to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. *Office of Workers Compensation Programs v. Greenwich Collieries*, [114 S.Ct. 2551, 2557–2558 (1994)], at 2258.

While the complaint allegations are relatively few and narrowly focused, the hearing herein occupied 9 days and resulted in a significant amount of testimony and a substantial number of exhibits. The parties closely litigated the employees' union and concerted activities and the Respondent's knowledge and animus respecting them. Equally closely litigated were the Respondent's decisional processes respecting the Golden-line layoffs, employee evaluations and subsequent operation and staffing of the line. It may be said that the Respondent's action in laying off the 15 Golden-line employees and the allegations of the complaint generally were litigated to a fair thee well.

In substantial and skillfully drafted briefs the parties marshaled and argued their cases. The Respondent paints a picture of an employer who simply extended its step-by-step modernization process to its Golden line by improving equipment and setting minimum standards for its production employees. The Respondent does not deny that it was at least generally aware that a union campaign was in its early days, and that many of its employees had signed petitions that were physically submitted to the Respondent. It denies strenuously, however, that those activities were a factor in its modernization efforts that included the contested layoffs. The Respondent emphasizes, on brief at 6, that a majority of workers from the "old" Golden line who signed the petitions herein were retained on the "new" Golden line as were "active and visible union supporters" such as employees Espinosa, Garcia, Navarro, and Acosta as well as "in-plant committee organizers" Taylor and Shilman.

The General Counsel and the Charging Party argue that the Respondent well knew which employees supported the Union and concertedly opposed certain of the Respondent's employment practices and sought to remove these troublemaking employees by means of the evaluation process. The General Counsel argues that there was no demonstrated need to lay off employees in anticipation of the actual operation of the new Golden line. The Government also argues that the Respondent's evaluation process was flawed in the information it considered and did not consider in evaluating employees. Further, the General Counsel and the Charging Party argue that, even were the initial failure to recall the old Golden-line employees not a violation of the Act, the subsequent failure to recall the old experienced employees when new inexperienced employees were hired was such a violation.

The Government in a 70-page brief has ably advanced its argument that the circumstantial evidence in the case sustains its burden of persuasion that the layoffs were improper. Included in that argument is a detailed recitation of testimonial inconsistencies and holes or illogical elements in the Respondent's explanation of events. The Charging Party assists in this effort. I have carefully considered the substantial record in this case and the arguments of the parties.

I am unable to conclude that the indirect evidence advanced by the Charging Party and the General Counsel is sufficient in its totality to carry the government's burden. Setting aside the testimony of Gutierrez to be discussed, infra, there is insufficient evidence of animus as well as insufficient evidence of manipulation of the modernization and employee evaluation processes to find that the Respondent improperly laid off employees or that the Respondent improperly failed to recall the employees at issue.

The General Counsel urges me to find knowledge of union activities by concluding the employees' union conversations were overheard. The Charging Party and the General Counsel further argue that the questionable elements of the Respondent's evaluation system both as to timing and rationale support a finding of subterfuge and pretext. There are usually minor inconsistencies in testimony and gaps or puzzling elements in a described series of events. While these gaps may be suspicious or raise doubts, as in the instant case, they are not in this case sufficient standing alone to carry the burden the Government bears on each element of its complaint.

None of the above, however, considers or addresses the testimony of former employee and Supervisor Gloria Gutierrez. Gutierrez' testimony of conversations and statements in her presence made by Berndt, Hernandez, and Sifuentes, if credited, gives the lie to the Respondent's disclaimers of knowledge of employees' union activities and animus against such employees in contest, herein, and describes overt plans by the

Respondent's management and supervisors involved in the employee evaluation process to subvert that process into a pretext or subterfuge for removing the troublemaking or leading union supporting employees. Her testimony is disputed by Berndt, Hernandez, and the Sifuentes and is, thus, itself under challenge as a fraud or fiction unrelated to actual events. The resolution of this diametrically opposed testimony is, in my view, the heart of the instant dispute. If credited, Gutierrez testimony clearly carries the Government's burden to show that the evaluation process, howsoever originally intended, was in the event used as a pretext to rid the Respondent of suspected union supporters and troublemakers. If discredited, the General Counsels case must rely on the other record evidence which I have found, supra, insufficient on its own to carry the government's case. Thus, in a practical sense, this case, despite the length of the record and the skills and advocacy of counsel, turns on this single witnesses testimony and the Respondent's challenge to it.

I have considered the testimony of Gutierrez both on direct and under cross-examination in light of the contrary testimony noted above as well as the record as a whole. In evaluating this conflict it is useful to initially consider probabilities. I do not find it fatally improbable that Gutierrez would have been in a position to hear the remarks she testified to as quoted in part, supra. Although Gutierrez was a supervisor for the Respondent only in July and August 1996, she had been working in the office for some time and was a friend and lunchmate of office employee Brenda Flores and Hernandez during the relevant period. It would not be unusual or unlikely for Hernandez to offer information and or advise to her friend and new supervisor Gutierrez when they went to lunch. Nor would it be unusual for such a new supervisor to be in meetings with management and other supervision. While one might wonder whether or not Mr. Berndt and Ms. Hernandez would have been so open in their remarks respecting employees, as a confidant of Hernandez and a new supervisor, Gutierrez would inevitably have to be brought up to speed on management's plans respecting personnel matters.

While Mr. Sifuentes did not recall meetings with Ms. Gutierrez, and Ms. Flores did not testify, Ms. Hernandez, Ms. Sifuentes, and Mr. Berndt denied that the statements attributed to them were ever made to or in the presence of Gutierrez. Whether or not it is an unfair labor practice or not, the Board's volumes make evident that employers do on occasion weed out "troublemaker" employees and the agents of those employers who took such actions do on occasion deny that their actions in firing or laying off employees were improperly motivated. It is not fatally improbable that a management and supervisory team—especially one that is close and in part related further by blood and marriage—would deny that an improper conversation or event occurred. The motivation to deny or conceal wrong-doing when ones actions are under challenge is perhaps a universal aspect of the human condition.

Considering Ms. Gutierrez' motivations, it is not fatally improbable that an employee will relate her employer agents' statements and or conversations or plans to authorities with an initial and ongoing reluctance to become involved as Gutierrez did herein. As the Respondent argues, however, it is also not fatally improbable that an employee feeling badly treated by her employer—as Ms. Gutierrez undoubtedly did—might harbor animus against it, which could color or even shape her testimony. Such animus, while not as common an occurrence, may motivate some employees to manufacture or fabricate events and circumstances designed to and offered to authorities with an intention to harm the employer or its agents.

I find that the probabilities involved herein tend to cancel out and in their totality do not strongly suggest a particular outcome in the credibility conflicts herein. Thus, while I find it less likely that several individuals would unite to falsely deny a conversation occurred than a single individual might, I also find it less likely that an employee would falsely ascribe detailed statements of intent and motivation to others, in effect falsifying out of whole cloth conversations which did not exist as compared to simply denying that an event occurred. Accordingly, this testimonial conflict in my analysis ultimately comes down to considering all aspects of the testimony with an evaluation of relative demeanor of the witnesses being the final and determinative factor in the evaluation of the conflicting evidence in light of the burden of persuasion the Government bears.

Gutierrez was either a witness to employer animus and had a plan to remove troublemaking employees under the pretext of an employee evaluation or she was a liar fabricating tales to do her former employer and its agents harm. I found her demeanor to be persuasive and conclude she was an honest, if somewhat obdurate and reluctant witness, who told the truth as she recalled it. I reject the argument that she was simply a tool of the Union or her own hostility to the Respondent and lied in furtherance of the Union's agenda or her own hostile feelings toward Berndt, Hernandez, and/or the Respondent. Her testimony seemed frank, if sometimes belligerent and not linearly responsive. I did not find her disingenuous or calculating as if she were testifying in furtherance of a plan or scheme. She seemed to be simply testifying from her memory of events. Simply put, while observing her demeanor during her testimony and reviewing that testimony in printed form in the record—all with a skeptical eye given the apparent significance of her testimony—I found her believable and I credit her testimony over the denials of Berndt, Hernandez, and the Sifuentes.

In crediting Gutierrez over Berndt, Hernandez, and the Sifuentes I do not so much reject their testimony based on their unsatisfactory or unpersuasive demeanor when considered in isolation, as I found her demeanor superior to theirs under all the circumstances and, in consequence give greater weight to her recitation of conversations and events, as noted supra, than their denials of those events.

Given this credibility resolution, I find that Hernandez made it clear to Gutierrez that the Respondent, i.e., Berndt, wanted to know and felt it knew who was supporting the Union and was hostile to those employees for that reason. Again based on Gutierrez' testimony I further find that in the critical meeting described above, Berndt and Hernandez identified about 20 employees as the most active union supporters and Berndt, in Gutierrez presence, told Hernandez and Sifuentes that the planned evaluation of Golden-line employees could be used as an excuse to justify getting rid of these most active union supporting employees. From this credited statement, I find that the evaluation process became part of a plan or scheme initiated by Berndt and joined in by Mesdames Sifuentes and Hernandez to remove from the Respondent's employ suspected union supporters. I further find that that scheme was in fact carried out with the failure to recall the 15 employees named above.

Putting all the above findings in the *Wright Line* context, I find that there is insufficient evidence to sustain the General

Counsel's allegations that the layoff of employees in May, the modernization of the Golden line or the initial determination to evaluate the Golden-line employees was improper. Gutierrez' testimony does not support those elements of the General Counsel's case.

My crediting of Gutierrez respecting the asserted determination of Berndt to manipulate the evaluation system in the context of the entire record and the General Counsel's arguments as described above meets the *Wright Line* requirement that the General Counsel persuade that antiunion sentiment[9] was a substantial or motivating factor in the Respondent's decision to provide less than satisfactory evaluations of and, in consequence. fail to recall the 15 employees named in the complaint. Accordingly, under *Wright Line* the burden of persuasion shifts to the Respondent to prove its affirmative defense that it would have permanently laid off these employees even if the employees had not engaged in protected activity.

There are two elements of this affirmative defense: First, that some old Golden-line employees would have been evaluated as inadequately performing irrespective of the protected activities of employees and, second, not all employees would have been recalled initially because the Respondent did not know how many employees would be needed in the new operation.

Turning to the first element of the defense, the Respondent must rely on the evaluation process itself to argue that some of the 15 employees were properly evaluated as below par and that this would have remained a basis for removing them as employees. The problem with this argument is that I have found the evaluation process—however benign or merit based the original plan—was abandoned by Berndt and the Respondent in the meeting described by Gutierrez as set forth above and the evaluation process was converted into a simple device for removing the suspected leading union adherents. Thus, I have found, the evaluation process as it was actually effectuated was tainted by its illegal and pretextual application to the old Golden-line employees and may not serve as evidence that any given employee would have been permanently laid off.

Since the Respondent at this stage of the proceeding has the explicit burden of persuasion in showing that the 15 employees, or any of them, would have been laid off had there been no protected activity, I find that the Respondent has failed to meet its burden and, therefore, find that all 15 employees named in the complaint would not have been laid off had their been no protected activity and would in consequence have been recalled to operate the "new" Golden line.

The second element of the defense is when these employees would have been rehired. Should these 15 employees have been rehired with the other old Golden-line employees on the first day of the Respondent's resumption of operations or should they be considered as properly recalled only as 15 new employees were hired over time to flesh out the line staffing. I do not find it improbable that the Respondent would have staged the staffing of the new Golden line as it in fact did adding new employees as the operation required even had their been no protected employee activity. The problem again is which of the original "old" Golden-line employees would have been in the group not initially hired. The evaluations are the only basis offered by the Respondent for making that determination and I have rejected the evaluation system as fatally tainted by animus as discussed above.

Again, since the Respondent at this stage of the proceeding has the explicit burden of persuasion in showing that the 15 employees, or any of them, would not have been recalled on the first day of resumed operations like their fellow employees had there been no protected activity, I find that the Respondent has failed to meet its burden and therefore find that all 15 employees named in the complaint would have been recalled to operate the "new" Golden line on the first day of its operations.

Given all the above, I find the Respondent's adverse evaluation of the 15 employees and its failure to recall them on the first day of operation of the "new" Golden line was based on the Respondent's belief that these employees were the leading union supporting employees and its desire to remove union supporters and to discourage other employees from supporting the Union. Such actions are a violation of Section 8(a)(3) and (1) of the Act. This allegation of the complaint is therefore sustained.

2. Complaint paragraph 6—the surveillance allegation

There is no significant dispute that the Respondent's supervisor, Juana Magana, drove past and was observed doing so by union meeting attendees at the Elks Park in Yakima on August 25, 1998. The fact that Magana's relative lived nearby was also unchallenged and provided a benign explanation for her presence in the area at the times in question.

In a reprise of the previous analysis, I view the evidence as insufficient to sustain the violation, but for the credited testimony of Gutierrez that Hernandez, a supervisor, told her that the Respondent had learned of the union meetings in the park, had sent someone to observe the attendees, had taken down the names of those individuals and had brought the list back to management who passed the names on to, at least, Supervisor Hernandez.[10] This additional evidence is sufficient to tip the scales in favor of the General Counsel that Magana was engaged in the surveillance of employees' union activities on August 25, 1996. I discredit the Respondent's contrary evidence. Such surveillance violates Section 8(a)(1) of the Act as alleged in the complaint and I so find.

REMEDY

Having found that the Respondent has violated the Act, I shall direct it to cease and desist therefrom, and take certain affirmative action in order to effectuate the purposes and policies of the Act, including the posting of a remedial notice consistent with *Indian Hills Care Centers*, 321 NLRB 87 (1996).

I shall direct the Respondent to make each wrongfully laid-off employee whole, with interest, for any and all losses of wages and benefits the employee would have received, but for the Respondent's wrongful layoff of him or her. The make-whole remedy shall be calculated in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950), and *Florida Steel Corp*.,

[9] The first aspect of antiunion sentiment found is the direct motive of removing suspected leading union supporting employees. A second motive, also pled by the General Counsel and properly found on this record, is that the termination of the union leaders would have a chilling effect on other employees' union activities.

[10] The statement of Hernandez is an admission by party opponent under the Fed. R. Evid. 801(d)(2) which is by the terms of the rule not hearsay and may be the considered substantively for the substantive proposition asserted. In reliance on it, I find that in fact the Respondent had engaged in surveillance as described at least up to the time of the conversation between Hernandez and Guttierez. It is also habit or routine practice evidence for the period after Hernandez statement to Gutierrez.

231 NLRB 651 (1977), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I shall further order the Respondent to delete and expunge from its records all references to the unsatisfactory evaluation and failure to recall of these employees and notify each of them in writing that this has been done and further assure them that neither their evaluation nor the failure to recall them will be used against them in future.

In a separate section of its brief, the General Counsel argues for new remedial language replacing current Board practice as follows:

> Preserve and, within 14 days of a request, provide at the office designated by the Board or its agents, a copy of all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order. If requested, the originals of such records shall be provided to the Board of its agents in the same manner.

In brief the General Counsel argues this new language would enable compliance to be better achieved with less cost to the Agency, will avoid cumbersome and time-consuming efforts in the face of respondent obduracy and lack of cooperation, and will generally bring the Board and its compliance procedures into modern times.

While I note the Board is very concerned with costs,[11] it is for the Board and not its administrative law judges to expand the current remedy for discharge violations. I therefore decline to include the recommended remedial language.

CONCLUSIONS OF LAW

1. The Respondent is and has been at all relevant times, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by engaging in surveillance of employees' attendance at union meetings.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by laying off or failing to recall the following employees on or about August 19, 1996:

Maria Amaya	Martha Bello
Alma Ceballos	Ofelia Corona
Victor Delgadillo	Lucila Dominguez
Xochil Guttierez	Rocio Larios
Loaurdes Nagana	Iracema Maldonado
Reyna Morales	Lucille Paradise
Erika Peneloza	Francisca Peraza

Bertha Valle

5. The unfair labor practices described above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

Based on the above findings of fact and conclusions of law and on the basis of the entire record, I issue the following recommended[12]

ORDER

The Respondent, George Joseph Orchard Siding, Inc., Yakima Valley, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Engaging in surveillance of employees' attendance at union meetings.

(b) Discharging, laying off, or failing to recall the following employees because the Respondent believed they were the most active employee supporters of the Union:

Maria Amaya	Martha Bello
Alma Ceballos	Ofelia Corona
Victor Delgadillo	Lucila Dominguez
Xochil Guttierez	Rocio Larios
Loaurdes Nagana	Iracema Maldonado
Reyna Morales	Lucille Paradise
Erika Peneloza	Francisca Peraza

Bertha Valle

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Rescind the discharges, layoffs, or failures to recall the employees named above.

(b) Offer, in writing, immediate, and full reinstatement to each of the employees named above to the position each previously held, discharging as necessary any replacement employee or, if the job no longer exists, to a substantially equivalent position, without prejudice to his or her seniority or any other rights or privileges previously enjoyed, and make each whole for any loss of earnings and other benefits suffered as a result of the discrimination against him or her, with interest as set forth in the remedy section of this decision.

(c) Remove from its files any reference to the unlawful evaluation or failure to recall the employees named above and notify these employees, in writing in Spanish and in English, that this has been done and that this unlawful conduct will not be used against them in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records and other records and documents necessary to analyze the amount of backpay and other moneys due under the terms of this Order and to insure that this Order has been fully complied with.

(e) Within 14 days after service by the Region, post at its Yakima, Washington facility where notices to employees are customarily posted copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director, in English and Spanish and such other languages as the Regional Director determines are necessary to fully communicate with employees and union members, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where

[11] See for example *George Joseph Orchard Siding, Inc.,* 325 NLRB 252 (1998).

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

[13] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure the notices are not altered, defaced or covered by other material. In the event that, during the pendancy of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 19, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.